

that Congress has prohibited. Indeed, FAA recognized that slot auctions would constitute a user fee when it proposed to institute such a fee in 1980, and again in 1986 when it decided not to do so. FAA also appeared to recognize that slot auctions would constitute a user fee in 2006 and 2007 when, in the face of the annual appropriations restrictions, it promised to and did seek legislation authorizing it to conduct the auctions. FAA's April 2008 proposal in fact acknowledges that because of the appropriations restriction, FAA "continues to believe that it cannot rely on a market-based [slot] allocation method under a purely regulatory approach, which is why it explicitly sought legislation on this matter." 73 Fed. Reg. at 20846, 20852.

FAA suggests that because it will conduct the Newark auction by solicitation of bids for slot leases, rather than by issuance of a new regulation, the language of the 2008 Consolidated Appropriations Act—which prohibits "any regulation" imposing new aviation user fees—does not apply. 2008 FAA Brief at 61 n. 36. Contrary to FAA's suggestion, because the auction would, in effect, amount to a user fee under IOAA, and IOAA requires agencies to prescribe regulations to impose new user fees, see 31 U.S.C. §9701(b), implementation of the auction would require a new regulation. FAA cannot elude the requirements of otherwise applicable law simply by failing to follow the law's requirements. "It is axiomatic that an agency cannot do indirectly what it is not permitted to do directly." *Forest Products Laboratory Agreement with University of Wisconsin*, 55 Comp. Gen. 1059 (1976).

FAA points to examples of other agencies auctioning or charging market-based fees for use of public lands or other public "property." 2008 FAA Brief at 48-49. These are inapposite because unlike FAA, those agencies had specific statutory authority for their activities. See, e.g., 16 U.S.C. §472a (U.S. Department of Agriculture auction of timber rights on National Forest Service land); 43 U.S.C. §315b (U.S. Department of Interior issuance of grazing permits for public lands for "reasonable fees"). FAA's most analogous example is the Federal Communications Commission's auction of license rights to the electromagnetic spectrum. Again, however, Congress has specifically authorized the FCC to conduct such auctions, including specifying the conditions necessary for auction, bidder qualifications, and treatment of auction proceeds. See 47 U.S.C. §309(j). As discussed above, despite FAA's specific requests, Congress has given FAA no comparable auction authority.

Finally, even if Congress were to remove the annual appropriations restriction that prohibits FAA from promulgating new aviation user fees, without other specific authority, it could impose only a cost-based fee, not the type of market-based fee it seeks to obtain by auctioning slots to the highest bidder. Under IOAA, when an agency is but one actor in the marketplace, it acts in a commercial, non-governmental capacity and may charge a fee based on the market price of the service provided. When instead an agency exercises its sovereign power and regulates activities based on public policy goals—as FAA would be acting, if it were to auction slots—it acts in a regulatory capacity, and user fees are limited to the agency's costs of providing the specific benefit to the individual recipient. If FAA's fee were based on market value and exceeded its cost of providing the slot to the recipient airline, the fee could rise to the level of a tax. A tax would be beyond IOAA's grant of authority and FAA would have to have some other Congressionally-delegated authority to impose it. *National Cable Television Ass'n, Inc. v.*

*United States*, 415 U.S. 336, 341 (1974); *National Park Service—Special Park Use Fees*, B-307319, Aug. 23, 2007.

#### CONCLUSION

We conclude that FAA may not auction slots under its property disposition authority, user fee authority, or any other authority, and thus also may not retain or use proceeds of any such auctions. Going forward with the planned Newark auction or any other auction would be without legal basis, and if FAA conducted an auction and retained and used the proceeds, GAO would raise significant exceptions, under its account settlement authority, 31 U.S.C. §3526, for violations of the "purpose statute," 31 U.S.C. §1301(a), and the Antideficiency Act, 31 U.S.C. §1341(a)(1)(A).

If there are questions concerning these matters, please contact Managing Associate General Counsel Susan D. Sawtelle at (202) 512-6417 or Managing Associate General Counsel Susan A. Poling at (202) 512-2667. Assistant General Counsels David Hooper and Thomas H. Armstrong, Senior Attorney Bert Japikse, and Staff Attorney James Murphy also participated in preparing this opinion.

Sincerely yours,

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#### ETHIOPIA

Mr. BROWNBACK. Mr. President, I would like to voice my support for the difficult work that Ethiopia is doing on the battlefield of the war on terror in the Horn of Africa. Ethiopia is a country of great importance to the United States, and is located in what some have called one of the roughest neighborhoods in the world. As one of our strongest allies in this complicated region, Ethiopia has shown promise in meeting both economic and security challenges.

Although Ethiopia remains one of the poorest countries in the world, it is developing a market-based economy which has experienced an impressive 10 percent annual growth since 2003. In addition, the Government of Ethiopia, in close collaboration with regional and international health organizations, has achieved some success in addressing global public health concerns, including the fight against HIV/AIDS, tuberculosis and malaria.

The US-Ethiopia bilateral relationship is strong and enduring. Ethiopia is a vital partner of the United States in the fight against terrorism, promoting regional stability and combating violent extremism. As a growing democracy, Ethiopia shares with the United States a common commitment to promoting freedom and human dignity.

With respect to Ethiopia's involvement in Somalia, it is important to understand that the U.S., U.N., E.U., and A.U., all have urged Ethiopia to remain in Somalia until replacement forces arrive or a stable government is formed. Ethiopian government officials have stated that while the Government of Ethiopia is anxious to remove their forces at the earliest possible time, it has delayed the withdrawal of troops from Somalia, at great political and economic cost, until replacement troops arrive to ensure the stability of

Somalia's Transitional Federal Government.

Unfortunately, while several nations have pledged to send replacement troops under the auspices of the African Union, only a small fraction of those pledged have actually arrived. I am grateful that Ethiopia remains committed to securing stability and peace in Somalia, and hope that the full African Union contingent arrives soon to enable the safe withdrawal of Ethiopian forces.

Ethiopia faces a host of ongoing challenges both at home and abroad, and merits our support and assistance. I urge my colleagues to join me in recognizing the progress made by this Ethiopia in promoting the health and welfare of its people, and assisting in the war on terror in the Horn of Africa.

#### PATIENT SAFETY AND ABUSE PREVENTION ACT

Mr. KOHL. Mr. President, I speak today in support of the Patient Safety and Abuse Prevention Act, S. 1577. This bill takes needed, practical steps to protect seniors in nursing homes and other settings wherever long-term care services are delivered. The background check procedures used by most States today are inadequate to keep out thousands of criminals, who can and do take advantage of loopholes and gaps in State systems. This results in needless tragedies and terrible harm to seniors.

As chairman of the Senate Aging Committee, I have read and heard about too many of these stories. One young woman, Jennifer Coldren, testified earlier this year that her 90-year-old grandmother was brutally assaulted by a predator who had a criminal record that went unnoticed. If a more comprehensive background check had been done on this individual, he would not have been working in this nursing facility, and the course of Jennifer's life and her grandmother's life would not have been so horribly altered.

It is past time for the Federal Government to take the lead in asking States to improve their screening processes. To do so, States must improve their infrastructure. They must connect and coordinate their State registries, such as those established for sex offenders and child abusers. They must screen all long-term care workers, including those who work in private homes. They must require State police checks and checks against the FBI's national criminal history database.

We know that States will take these steps to improve their background check procedures if Congress incentivizes them to do so. Seven States did exactly that after we provided them with modest grants under a pilot program enacted as part of the Medicare Modernization Act of 2003. The dollar amounts required to get these States to expand and improve